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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. TERRY JAY MEYERS, Defendant and Appellant.	C058368 (Super.Ct.No. 87F5638)

Defendant Terry Meyers appeals from an order involuntarily recommitting him to an indeterminate term in the custody of the Department of Mental Health (the Department) as a sexually violent predator (SVP) pursuant to the amended Sexually Violent Predator Act (SVPA). (Welf. & Inst. Code, § 6600 et. seq.; further section references are to the Welfare and Institutions Code unless otherwise specified.) He contends that the order must be reversed because (1) a prosecution expert's testimony shifted the burden of proof on a critical element and must be discounted, which means the order is not supported by substantial evidence;

(2) his recommitment was based upon the Department's illegal use of underground regulations in the evaluation and screening process; and (3) the amended SVPA violates various constitutional rights and provisions, including due process, the ex post facto clause, equal protection, and the First Amendment. We shall affirm the judgment.

FACTS

The prosecution presented the testimony of two experts, Dr. Nancy Rueschenberg, a licensed clinical psychologist, and Dr. Jeffrey Davis, a licensed psychologist, who both concluded that defendant met the criteria for commitment as an SVP.

Dr. Rueschenberg interviewed and evaluated defendant in January 2007. In October 2007, she prepared an updated evaluation based upon a review of defendant's records because he refused to meet with her. She opined that defendant met the first criterion for commitment as an SVP because he had been convicted of committing a sexually violent offense against one or more victims. He was convicted of forcible rape of a stranger in Oregon in 1973, forcible rape of a stranger or casual acquaintance in Shasta County in 1982, and attempted rape of a casual acquaintance while he was on parole in 1987.

Dr. Rueschenberg diagnosed defendant as suffering from paraphilia (a sexual disorder) not otherwise specified (NOS) with nonconsenting female adults; alcohol dependence in remission in a controlled environment; and a personality disorder NOS, with antisocial and narcissistic features. She opined that he had demonstrated a lack of volitional control over his behavior, as

evidenced by the fact he had been sanctioned repeatedly for inappropriate sexual behavior and yet had continued to reoffend. He had not expressed much remorse for his victims; "mostly he blamed them or felt they'd asked for it, or they had lied." Dr. Rueschenberg explained that paraphilia tends to be chronic and long term. A person can learn to control paraphilia with extensive treatment, "but the very core of it never goes away."

Based on various factors, Dr. Rueschenberg concluded there was a serious and well-founded risk defendant would reoffend. The Static-99, an actuarial instrument used to assess the risk of reoffense, indicated that defendant was in the medium-high risk category. She also considered several static and dynamic factors not accounted for by the Static-99, factors which were consistent with placing defendant in the medium-high risk range. Defendant had a sex drive preoccupation, as evidenced by his self-reported 150 to 200 partners and his three convictions. Defendant had "a sense of sort of entitlement that he could take what he wanted." He lacked any "protective factors" mitigating the chance of a person sexually reoffending. Although defendant was 57, he was in good health overall. Unless a person is over the age of 60 and in poor health, an adjustment in the risk of reoffending is not warranted.

Dr. Rueschenberg stated that the Department's treatment program for SVPs consist of five stages, the first four of which are in-patient. Defendant had been in phase two of treatment for a time, but was no longer involved in treatment at the time of trial. Dr. Rueschenberg opined that defendant was unlikely

to continue treatment on his own in the community, given his failure to take advantage of treatment options in a strictly controlled environment.

The prosecution's other expert, Dr. Davis, evaluated defendant in August 2005 and prepared two updated evaluations about one year apart. In completing these evaluations, he met with defendant three times and reviewed his records. Dr. Davis opined that defendant met the first criterion for commitment as an SVP based upon his criminal history. He diagnosed defendant as suffering from a paraphilia NOS with nonconsenting persons, alcohol abuse, and antisocial personality disorder. Dr. Davis opined that defendant lacked volitional control and was predisposed to the commission of criminal sexual acts. He explained that paraphilias are "chronic durable disorders" which do not "just . . . go away." The goal is to manage the disorder rather than to cure it.

Dr. Davis agreed with Dr. Rueschenberg that there was a serious and well-founded risk that defendant would reoffend in a sexually violent predatory manner. He based his opinion on defendant's Static-99 score, which placed defendant in the medium-high level of risk of reoffense. Dr. Davis considered other factors to determine if an adjustment to the actuarial estimate was warranted, but concluded an adjustment was not appropriate based on defendant's failure to complete the Department's treatment program. Although a decreased risk of reoffense might be expected at age 57, defendant was an energetic man who still had ample anger toward women, which prevented his age from being

a significant protective or mitigating factor. Dr. Davis doubted that defendant would begin outpatient treatment on his own in the community because he adamantly denied having a disorder and terminated treatment while in the custody of the Department.

Two psychologists, Dr. Jeremy Coles and Dr. Michele Reed, testified on behalf of defendant. Both agreed that defendant had been convicted of a sexually violent offense against one or more victims and suffered from paraphilia NOS with nonconsenting persons and an antisocial personality disorder. They had opined previously that defendant met the criteria for an SVP, with Dr. Cole reaching this conclusion in 2005 and Dr. Reed doing so in January 2007. However, they no longer believed that defendant posed a serious and substantial risk of reoffense. Their opinions were based primarily on defendant's age because he was "closing in on fifty-eight." Dr. Coles pointed to the fact that "age research is new and is suggesting that individuals that have sexual disorders and commit sex crimes reoffend at lower rates the older they get. Specifically, people that are committing sexual assaults of adults." Dr. Reed added that there were a number of problems with the Department's treatment program, which is based on a "relapse prevention model" and had not proved to be "particularly effective in helping to reduce recidivism."

Female employees who had contact with defendant while he was at Coalinga State Hospital testified for the defense as character witnesses, describing defendant as compliant with hospital rules, remorseful for his past behavior, and respectful toward the female staff.

Defendant testified and denied he suffered from paraphilia NOS. If he were released into the community, his release plan would be to avoid "lower companionship," which he described as "a bag whore or a crank whore . . .; a woman who sells her body for a little bit of crank."

DISCUSSION

I

An SVP is "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a).) "An SVP extension hearing is a new and independent proceeding at which, with limited exceptions, the petitioner must prove the defendant meets the criteria, including that he or she has a currently diagnosed mental disorder that renders the person dangerous." (*People v. Munoz* (2005) 129 Cal.App.4th 421, 429 (hereafter *Munoz*).)

Relying on *Munoz*, defendant contends the evidence is insufficient to support the jury's finding that his disorder *currently* caused him to be dangerous and likely to engage in sexually violent criminal behavior if released. He points out that when his attorney questioned Dr. Rueschenberg about what evidence she had to support her current clinical diagnosis of defendant, she replied: "It's more that I have a lack of evidence to conclude that he no longer suffers from the disorder. The fact that he hasn't acted out in a strictly

controlled environment is not evidence that he no longer suffers from that disorder." According to defendant, "R[ue]schenberg's testimony lessened the prosecution's burden [of proof] by suggesting to the jury that substantial evidence of a current mental disorder could simply be presumed from a past diagnosis and commitment. Since the evidence in this case was equally divided on the issue, R[ue]schenberg's 'diagnosis' amounted to, as *Munoz* held, a presumption which impermissibly shifted the burden of proof and violated [defendant's] rights to due process."

Defendant's argument is not supported by the record, when viewed in context, and *Munoz* is distinguishable.

In *Munoz,* two doctors testified that David Munoz suffered from paraphilia; that because of this disorder he had difficulty controlling his deviant behavior; and that if he were released he would likely engage in future violent, predatory behavior. (*Munoz, supra,* 129 Cal.App.4th at p. 425.) Munoz presented two doctors who testified he did not suffer from a disorder such as paraphilia or pedophilia which would predispose him to commit sexual offenses. (*Id.* at pp. 425-426.) The trial court permitted the prosecution to elicit evidence that on previous occasions, Munoz was committed as an SVP and had not challenged the prior findings that he suffered from a mental disorder that predisposed him to the commission of sexual offenses. (*Id.* at pp. 426-428.)

During argument to the jury, the prosecutor asserted that Munoz was a sexually violent predator and there had been no change

in him during his two years at the hospital. (*Munoz, supra,* 129 Cal.App.4th at p. 428.) The prosecutor emphasized that Munoz had previously been committed as an SVP and had not contested the findings. (*Ibid.*)

On appeal from the order of recommitment, the Court of Appeal reversed, observing that it may be impossible to avoid having the jury learn of prior SVP commitments, because it may be necessary for experts to discuss the defendant's treatment and behavior in the state hospital, but "[s]till, it is necessary that nothing be done that suggests to the jury that its task is to compare the defendant's present mental status with an earlier finding that he or she is an SVP. As we have noted each SVP hearing addresses the defendant's current mental state. Nothing must be done to suggest the defendant is required to prove he is no longer an SVP or to effectively lessen the state's burden by establishing a datum of mental disorder and dangerousness." (*Munoz, supra,* 129 Cal.App.4th at p. 432.)

The appellate court then noted that such a suggestion was precisely what had occurred--"The manner in which the prosecutor questioned witnesses, the evidence the trial court admitted, and the manner in which petitioner argued the case suggested that the issue was whether anything had changed since [Munoz's] prior SVP commitment." (*Munoz, supra,* 129 Cal.App.4th at p. 432.) Thus, the court reversed the commitment order.

Here, unlike in *Munoz,* all four experts, including those who testified for the defense, agreed that defendant suffered from a current mental disorder of paraphilia NOS with nonconsenting

persons. The trial court did not allow factual evidence from the prior commitment, and the prosecutor's focus in questioning the witnesses did not suggest the issue was whether defendant continued to be an SVP. There was no suggestion made to the jury that the question it had to decide was whether anything had changed such that defendant was no longer an SVP; rather, the jury was advised that it had to decide whether defendant currently met the criteria for an SVP and that the People had the burden of proving this.

For example, the prosecutor explained that she had to prove defendant was convicted of sexually violent offenses against one or more victims; that he suffers from a diagnosed mental disorder; that he is a danger to the health and safety of others because it is reasonably likely he will engage in predatory criminal behavior; and that it is necessary to keep him in custody in a secure facility. She stated that all four experts agreed defendant suffered from "[p]araphilia NOS nonconsenting adults," but that two experts disagreed about the third criteria "which is the one absolutely at issue here." Pointing out the two experts who found defendant did not pose a current threat did so based upon his age, the prosecutor argued that a 57-year-old man is "not that old." She emphasized that the important issue was "about [defendant] sitting right here and what his likelihood of reoffense is."

Defense counsel conceded that all four doctors diagnosed defendant with a mental disorder, but attempted to undermine their diagnoses as being too nonspecific. He argued that the

disorder was not current because defendant behaved around female staff. Counsel also asserted that defendant was not likely to engage in sexually criminal behavior if released into the community because of his age.

The trial court instructed the jury that the prosecution had the burden to prove the SVP allegations beyond a reasonable doubt. And in a pre-trial instruction, the court explained to the jury that defendant did not have to prove he was not an SVP. The court stated the jury "may not conclude [defendant] is a sexually violent predator based solely on his alleged prior convictions without additional evidence that he currently has a diagnosed mental disorder."

Unlike in *Munoz*, here there was no implication, hint, or suggestion that defendant bore the burden of showing he no longer was a danger to commit violent predatory sexual acts if released. Instead, under the instructions and argument, that burden remained squarely with the prosecution. Thus, *Munoz* is distinguishable.

It is true Dr. Rueschenberg's opinion that defendant posed a risk for reoffending was based, in part, on his prior conduct; but it was entirely proper for her to do so. (See *People v. Poe* (1999) 74 Cal.App.4th 826, 830-832 [relying on criminal history in rejecting a claim that that record lacked sufficient evidence to support the finding that the person was likely to engage in sexually violent behavior].) Every "SVP extension hearing is a new and independent proceeding" (*Munoz, supra,* 129 Cal.App.4th at p. 429), which means the prosecution's expert witnesses must review defendant's entire record to determine anew whether he is

an SVP. Here, all the experts did so, including defendant's, and all four found that he suffered from a mental disorder. Defendant's experts simply concluded he was not an SVP based on their disagreement with the prosecution's experts regarding the likelihood of defendant engaging in predatory criminal behavior. However, the testimony of one expert, believed by the jury, is sufficient to prove defendant is an SVP at risk of reoffending (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064); and two experts opined he presently suffers from a mental disorder that makes it likely defendant will reoffend in a violently sexually predatory manner. Consequently, substantial evidence supports the order recommitting defendant as an SVP.

II

Defendant's next challenge concerns a Department protocol governing psychological evaluations. The SVPA requires that a suspected SVP undergo two psychological evaluations conducted pursuant to a protocol established by the Department. Evaluations concluding that an individual is an SVP lead to what is essentially a probable-cause hearing, and ultimately to trial. (§ 6601, subds. (c) & (d); *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 247.) At the probable cause hearing on the petition seeking to recommit defendant as an SVP, the People submitted evaluations prepared by psychologists in accordance with the Department's protocol. Finding probable cause to believe that defendant was likely to engage in sexually violent behavior upon his release, the court set the matter for trial.

Defendant moved to dismiss the petition on the ground the evaluations were invalid because they were based on Department protocols that had not been properly promulgated as regulations in accordance with the Administrative Procedure Act (APA). The trial court overruled the objection, stating the motion was untimely and should have been raised prior to the probable cause hearing; the protocol was not a regulation; and defendant failed to exhaust his administrative remedies. The matter proceeded to trial, and defendant was recommitted for an indeterminate term.

On appeal, defendant contends that the trial court erred in overruling his motion and that the subsequent order of commitment is invalid because it was obtained by the use of evaluations procured by the Department in violation of the APA. (Gov. Code, § 11340 et. seq.) According to defendant, "his SVPA required evaluations are consequently invalid as they were conducted pursuant to a policy that skirted the required administrative review process." He concludes that, "since those evaluations were the primary instrument in obtaining the order of recommitment, his recommitment to an indeterminate term of civil confinement must also be vacated." We disagree.

Government Code section 11340.5, subdivision (a) of the APA provides: "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application,

or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." The Office of Administrative Law (OAL) is charged with enforcing this requirement. (Gov. Code, §§ 11340.2, 11340.5, subd. (b).)

Recently, the OAL found that the Department's protocol was an unlawful "underground regulation." (2008 OAL Determination No. 19, Aug. 15, 2008 (OAL file No. CTU 2008-0129-01) (<http://www.oal.ca.gov/determinations2008.htm.>)[1] "'An underground regulation is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the [APA]. [Citation].'" (*Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 429.) The OAL determination is not binding on the courts, but it is entitled to deference. (*Grier v. Kizer* (1990) 219 Cal.App.3d 422, 434-435, disapproved on other grounds by *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577.)

The People do not argue the OAL's determination is incorrect. Given the People's failure to challenge OAL's position, and our ultimate conclusion defendant has failed to establish prejudicial error, we will assume without deciding that the protocol is an underground regulation in violation of the APA.

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[1] We granted defendant's request to take judicial notice of OAL Determination No. 19, which provides that the protocol used by the Department for SVP evaluations--the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)"--met the statutory definition of a regulation and, therefore, should have been adopted pursuant to the APA. Because it was not, it was an unlawful "underground regulation."

The protocol is statutorily mandated for use in the administrative evaluations leading up to the filing of an SVP petition. (§ 6601, subds. (c) & (d).) However, the evaluations are a collateral procedural condition designed to ensure SVP proceedings are initiated only when there is a substantial factual basis for doing so. After the petition is filed, the issue becomes whether there is evidence that the alleged SVP is a person likely to engage in sexually violent predatory criminal behavior. (*People v. Scott, supra,* 100 Cal.App.4th at p. 1063.) Even though the requirement for evaluations is not one affecting disposition of the merits, defendant intimates the evaluations play a significant part in the trial process and not just the probable-cause hearing. Nonetheless, defendant must still show prejudice. (Cal. Const., art VI, § 13.)

Error is reversible only where it affects the substantial rights of the parties, a party has sustained a substantial injury, and a different result would have been probable if the error had not occurred. (See Code Civ. Proc., § 475; *Sabek, Inc. v. County of Sonoma* (1987) 190 Cal.App.3d 163, 168 [anyone who seeks reversal must show error was prejudicial]; accord, *People v. Medina* (2009) 171 Cal.App.4th 805 (hereafter *Medina*) [claim that the protocol's status as underground regulation undermines the legitimacy of SVP commitment is reviewed for prejudice].) Prejudice is not presumed; thus, defendant has the burden of demonstrating a miscarriage of justice has occurred. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) He has not done so.

There is no reason to believe that a dismissal of the petition on the ground that the protocol was not APA compliant would have resulted in an abandonment of the commitment proceedings. Nor is there any evidence to support a conclusion that, had defendant been evaluated under an APA-compliant protocol, he would have been found not to be an SVP. The OAL determination did not suggest that the Department's protocol is deficient or unreliable as an instrument for assessing a person's status as a potential SVP. In fact, the OAL's determination includes a caveat that its review of the protocol was only for the purpose of deciding whether it was a regulation within the meaning of the APA, and that OAL was not evaluating the advisability or wisdom of the protocol itself. (2008 OAL Determination No. 19, *supra,* at p. 1.)[2]

Defendant makes no showing that, had the protocol been submitted to APA review, it would have been changed or that any changes would affect his personal standing as an SVP. He does not attack any of the tools used pursuant to the protocol or make any arguments demonstrating deficiencies in the protocol, other than to say that it was not adopted pursuant to the APA. Apart from asserting the protocol's status as an "underground regulation,"

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[2] The OAL determination made it clear the ruling was concerned solely with whether the protocol satisfied the criteria for a regulation under Government Code section 11342.600. It made no assessment as to the protocol's "advisability" or "wisdom." Rather, the determination cautioned that the OAL "has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination." (<http://www.oal.ca.gov/determinations2008.htm.>)

defendant fails to explain how its use in the proceedings against him resulted in actual prejudice, either by depriving him of a fundamental right or a fair trial.

At trial, the doctors' opinions concerning defendant's status as an SVP were based on their interviews with defendant, their independent professional training and education, the use of multiple standardized professional assessment tools, and their review of defendant's past offenses and prior treatment record. Although the experts were guided by the standardized assessment protocol, they still reached their own independent professional opinions. There is no suggestion in the record the evaluators felt constrained by the protocol and would have concluded differently had they not been required to follow it.

Because defendant has not shown that a different result was probable had the Department's protocol been vetted through APA procedures (*Medina, supra,* 171 Cal.App.4th at p. 820), his claim of prejudicial error fails.

III

Defendant's next four contentions concern statutory amendments to the SVPA.

Originally, the SVPA provided for a two-year civil commitment of any person who was tried and found beyond a reasonable doubt to be an SVP. (*People v. Williams* (2003) 31 Cal.4th 757, 764, cert. den. *sub nom. Williams v. California* (2004) 540 U.S. 1189 [158 L.Ed.2d 98].) Upon expiration of the two-year term, the term could be extended only if the government again proved in a jury trial,

beyond a reasonable doubt, that the person remained an SVP. (Former §§ 6604, 6604.1.)

In 2006, Senate Bill No. 1128 and Proposition 83 amended the SVPA to change the initial commitment from a two-year term to an indeterminate term. (*Bourquez v. Superior Court* (2007) 156 Cal.App.4th 1275, 1280-1281.) Because the term of commitment is indeterminate, the government no longer has to prove at regular intervals, beyond a reasonable doubt, that the person remains an SVP. Instead, the Department must examine the person's mental condition at least once every year and must report annually on whether the person remains an SVP. (§ 6605, subd. (a).) If the Department determines the person is no longer an SVP, the director of the Department must authorize the person to petition the court for unconditional discharge. (§ 6605, subd. (b).) If, on consideration of such a petition, the court finds probable cause to believe the person is no longer an SVP, the court must conduct a hearing, at which the government has to prove beyond a reasonable doubt that the person is still an SVP. (§ 6605, subds. (c) & (d).) If the government meets that burden, the person must (once again) be committed for an indeterminate term. (§ 6605, subd. (e).) If the government does not meet its burden, then the person must be discharged. (*Ibid.*)

The only other avenue for release from confinement under the amended SVPA is a petition under section 6608. This statute remains substantially the same as before the enactment of Senate Bill No. 1128 and the passage of Proposition 83. In bringing this petition, the committed person is entitled to the assistance of

counsel. (§ 6608, subd. (a).) When the court holds a hearing on the petition, the committed person has the burden of proof to show that he or she is no longer an SVP based on a preponderance of evidence. (§ 6608, subd. (i).) The court may summarily deny the petition if it determines that it is frivolous. (§ 6608, subd. (a).)

Defendant contends that the amended SVPA violates various constitutional provisions, including due process, the ex post facto clause, equal protection, and the First Amendment to the United States Constitution.[3] All of his contentions have been addressed and rejected by several appellate courts (*People v. McKee* (2008) 160 Cal.App.4th 1517, review granted July 9, 2008, S162823; *People v. Johnson* (2008) 162 Cal.App.4th 1263, review granted Aug. 13, 2008, S164388; *People v. Boyle* (2008) 164 Cal.App.4th 1266, review granted Oct. 1, 2008, S166167; *People v. Garcia* (2008) 165 Cal.App.4th 1120, review granted Oct. 16, 2008, S166682), including this court (*People v. Riffey* (2008) 163 Cal.App.4th 474, review granted Aug. 20, 2008, S164711 (hereafter

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[3] Although defendant did not expressly raise either his ex post facto or First Amendment claim in the trial court, he contends that, if the issues are forfeited as a result of trial counsel's failure to object on those grounds, then he received ineffective assistance of counsel. Of course, counsel is not ineffective for failing to make futile or unmeritorious objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834; accord, *People v. Price* (1991) 1 Cal.4th 324, 387; *In re Wright* (2005) 128 Cal.App.4th 663, 674.) As we will explain, defendant' ex post facto and First Amendment claims are unavailing. Regardless of whether the issues are forfeited, it is necessary to address the underlying merits to show that trial counsel was not ineffective for failing to object.

Riffey)). Although the California Supreme Court has granted review in all of those cases, we continue to agree with the rationales in those opinions, which defeat all of defendant's contentions. Defendant acknowledges the aforesaid opinions, presents no arguments attempting to undermine the rationale stated therein, and simply reiterates the arguments raised by the SVPs in those cases in order to preserve the issue for review by the Supreme Court. Thus, we shall only briefly address why his various claims fail.

IV

Defendant contends the amended SVPA violates due process because it places the burden of proof on him to establish that he should be released, and because it does not provide for mandatory periodic hearings on whether continued commitment is warranted. We rejected similar contentions in *Riffey*.

In evaluating a due process claim, the United States Supreme Court has set forth a three-factor test. "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [47 L.Ed.2d 18, 33] (hereafter *Mathews*).) The court has applied this test to

involuntary civil commitments. (*Addington v. Texas* (1979) 441 U.S. 418, 425 [60 L.Ed.2d 323, 330] (hereafter *Addington*).)

Here, the private interest is the loss of liberty. "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. [Citations.]" (*Addington, supra,* 441 U.S. at p. 425 [60 L.Ed.2d at pp. 330-331].) However, the state may restrict this interest in appropriate circumstances. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 356 [138 L.Ed.2d 501, 511-512] (hereafter *Hendricks*).)

We first note that the initial commitment hearing satisfies federal due process requirements. At said hearing, the SVPA requires the prosecutor to prove beyond a reasonable doubt that a person meets the definition of an SVP, i.e., he or she has been convicted of a sexually violent offense and has a diagnosed mental disorder that makes the person a danger to others. Defendant has no quarrel with the procedures governing this hearing. He focuses on the risk a committed person will continue to be involuntarily committed even though he or she is no longer mentally ill and a danger to others. He argues the lack of periodic judicial review and the shifting of the burden of proof from the state to the committed person greatly increase this risk.

Nothing in the SVPA affects the trier of fact's finding regarding the qualifying offense at the initial commitment hearing. Since this finding remains valid during the annual reviews or future proceedings, it does not increase the risk of an improper commitment. Turning to the committed person's mental disorder and dangerousness, one can reasonably infer that this

condition will continue for an undetermined period of time. (See *Jones v. United States* (1983) 463 U.S. 354, 368 [77 L.Ed.2d 694, 708] ["because it is impossible to predict how long it will take for any given individual to recover--or indeed whether he ever will recover--Congress has chosen, as it has with respect to civil commitment, to leave the length of commitment indeterminate, subject to periodic review of the patient's suitability for release"].) At issue here is whether the review procedures are adequate to ensure that the committed person is held "as long as he is both mentally ill and dangerous, but no longer." (*Foucha v. Louisiana* (1992) 504 U.S. 71, 77 [118 L.Ed.2d 437, 446].)

Contrary to defendant's claim, the lack of periodic judicial review does not create an undue risk of erroneous deprivation of a committed person's liberty interest. The SVPA requires an annual review of the committed person's mental health status, which is then forwarded to the court and the prosecutor. The committed person is also entitled to an evaluation by an independent expert. When the committed person no longer meets the definition of an SVP, the Director of Mental Health is required to authorize the person to file a petition for a conditional release or unconditional discharge. Since the goal of the mental health system is to treat mentally ill patients so they may function as healthy individuals in the community, we can infer that medical professionals and the Director of Mental Health are not biased against committed persons or their release. Moreover, the frequency of the medical reviews reduces the risk that the committed person will be confined longer than is necessary. Balanced against these considerations, the

value of judicial review every two years is slight. As the United States Supreme Court has noted, "'neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments.'" (*Parham v. J.R.* (1979) 442 U.S. 584, 607 [61 L.Ed.2d 101, 122], quoting *In re Roger S.* (1977) 19 Cal.3d 921, 942 (dis. opn. of Clark, J.).)

The next consideration is whether there is a risk of an erroneous determination under the SVPA provisions regarding the burden of proof. When the Department has not authorized the filing of a petition, the committed person, who is entitled to the assistance of counsel, may file a petition for release. If the trial court determines that the petition is frivolous, there is no risk of an erroneous determination. In cases where the court holds a hearing on the petition, the committed person has the burden of proof to show that he or she is no longer an SVP based on a preponderance of evidence. (§ 6608, subd. (i).) Under these circumstances, the lack of evidence rather than the burden of proof will make it difficult for the committed person to prevail. For this reason, the value in shifting the burden of proof to the prosecutor would be slight. Thus, placing the burden of proof on the committed person at this hearing creates little risk of an erroneous deprivation of his or her liberty.

Turning to the state's interest, we find that the state has a substantial interest in providing treatment to individuals who suffer from mental illness and in protecting the public from individuals whose mental illness makes them a danger to others. (*Addington, supra,* 441 U.S. at p. 426 [60 L.Ed.2d at p. 331].)

The state also has a substantial interest in preserving its resources by avoiding the unnecessary relitigation of cases. (See *U.S. v. Wattleton* (11th Cir. 2002) 296 F.3d 1184, 1200-1201.)

Thus, upon applying the balancing test set forth in *Mathews, supra,* 424 U.S. 319 [47 L.Ed.2d 18], we conclude the present statutory scheme has sufficient safeguards to protect the individual's liberty interest while providing for the state's significant interests.

V

Defendant claims that the SVPA is unconstitutional because it violates the ex post facto clause, which prohibits laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. (*Collins v. Youngblood* (1990) 497 U.S. 37, 43 [111 L.Ed.2d 30, 39].) The ex post facto clause applies exclusively to penal statutes; thus, if a commitment statue does not impose punishment, it does not implicate ex post facto protection. (*Hendricks, supra,* 521 U.S. at pp. 370-371 [138 L.Ed.2d at p. 520].)

It is well settled that a commitment under the SVPA is civil in nature and legally does not amount to punishment. (*People v. Vasquez* (2001) 25 Cal.4th 1225, 1231-1232; see also *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1179 [the SVPA does not violate the constitutional proscription against ex post facto laws because it does not impose punishment or implicate ex post facto concerns]; *People v. Chambless* (1999) 74 Cal.App.4th 773, 776, fn. 2 [the SVPA is not punitive and does not impose liability or

punishment for criminal conduct; thus, double jeopardy and cruel and unusual punishment claims fail].) But all the cases interpret the SVPA prior to its amendment calling for an indefinite term.

Defendant argues that the indefinite term makes the current version of the SVPA particularly punitive. This is the same argument that this court rejected in *Riffey* and that was rejected in other cases currently pending review before the California Supreme Court. Language in Proposition 83 places the statutory changes in context and demonstrates the voters distinguished between those provisions that involved criminal penalties for sexual offenders and those that amended the SVPA. The voters expressed their intent that the SVPA, as amended by Proposition 83, would strengthen and improve the laws that relate to the commitment and control of SVPs. The SVPA, in turn, provides treatment, not punishment, for SVPs. The amendments to the SVPA have changed the review and release process for SVPs, but have not altered the potential length of an SVP's commitment period, which remains dependent on the successful treatment of the SVP's mental disorder.

Defendant concedes the ex post facto issue has been decided adversely to him, and he suggests no reason to depart from the rationale of the cases pending review. We adopt the reasoning of those cases, which unanimously have held that the indefinite term of commitment does not itself convert a civil commitment under the SVPA to a punitive confinement. The prohibition against ex post facto punishment is a constitutional guarantee applicable only to criminal cases, not to civil commitments under the SVPA.

VI

Defendant contends his indeterminate commitment with limited judicial review violates his right to equal protection of laws. He contends an SVP is similarly situated with those committed under Penal Code sections 2960 et seq. as mentally disordered offenders (MDOs) and those committed after a finding of not guilty by reason of insanity (NGIs). As explained in *Riffey*, SVPs are not similarly situated to either group and, thus, the equal protection argument fails.

"The constitutional guaranty of equal protection of the laws means simply that persons similarly situated with respect to the purpose of the law must be similarly treated under the law. [Citations.] If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold. [Citation.] The question is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1155.)

Initially, we note that defendant asserts, *without analysis*, that SVPs are similarly situated with MDOs and NGI acquittees. Accordingly, he has not carried his burden on appeal to persuade us that SVPs are similarly situated to these groups to the extent the Legislature has adopted a classification that affects them in an unequal manner. We find significant differences between the groups.

SVPs and MDOs differ with respect to their amenability to treatment. "[T]he MDO law targets persons with severe mental disorders that may be kept in remission with treatment (Pen. Code, § 2962, subd. (a)), whereas the SVPA targets persons with mental disorders that may never be successfully treated (Welf. & Inst. Code, § 6606, subd. (b))." (*People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1222.) "Given these contrasting backgrounds and expectations related to treatment, we cannot say the two groups are similarly situated in this respect for equal protection purposes." (*People v. Buffington, supra,* 74 Cal.App.4th at p. 1163.)

SVPs and NGIs differ significantly in how they are committed in the first place. A person who is found not guilty because he or she was insane at the time of the crime is automatically committed, without an evidentiary hearing to determine if the person is still insane at the time of commitment. (Pen. Code, § 1026.) In contrast, a person cannot be committed under the SVPA until a trier of fact finds beyond a reasonable doubt that the person is an SVP. (§ 6604.) Given the disparate manner in which SVPs and NGI acquittees are committed in the first place, and the lack of any argument from defendant on the point, we conclude defendant has failed to show that SVPs and NGIs are similarly situated for purposes of the laws governing judicial review of their commitments.

VII

Lastly, defendant contends the SVPA limits his right to seek redress of grievances in violation of the First Amendment. The United States Constitution requires that defendants have "a reasonably adequate opportunity to present claimed violations of

fundamental constitutional rights to the courts." (*Bounds v. Smith* (1977) 430 U.S. 817, 825 [52 L.Ed.2d 72, 81], overruled on other grounds in *Lewis v. Casey* (1996) 518 U.S. 343 [135 L.Ed.2d 606].) Defendant argues the statute violates this constitutional right because section 6605, subdivision (b) states that an SVP can file a petition for release only with the concurrence of the director of the Department, which is essentially a screening tool allowing the Department to be the "gatekeeper" of petitions seeking release. According to defendant, this is analogous to a regulation found to be unconstitutional in *Ex Parte Hull* (1940) 312 U.S. 546, at page 549 [85 L.Ed. 1034, 1035-1036]. His contention is not persuasive.

Section 6608, subdivision (a) states: "Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the Director of Mental Health." Therefore, he retains a right to petition the courts directly. Defendant concedes this is so, but claims the right is meaningless because, although he has the right to appointed counsel, there is no provision allowing for the appointment of the medical expert who will be necessary to prove the detainee's case. He also argues the statute imposes a presumption of frivolousness which favors continued commitment without judicial review. This court rejected a similar contention in *Riffey, supra.*

If the SVP previously has filed a petition for release which was found to be frivolous, or the court found conditions had not changed and the SVP remained a danger to the community if released,

"the court shall deny the subsequent petition [without a hearing] *unless* [the petition] contains facts upon which a court could find that the condition of the committed person had so changed that a hearing was warranted." (§ 6608, subd. (a), italics added.) In other words, a threshold showing is required before a full evidentiary hearing will be granted. This procedure does not deny access to the courts. There is a judicial officer charged with making the determination regarding the frivolousness of the petition. In addition, the SVP has the assistance of counsel to make an initial showing. (*Ibid.*) Further, although section 6608 does not expressly provide for the assistance of an expert, the SVP is entitled to the appointment of an expert at the annual review. (§ 6605, subd. (a).) Nothing in section 6608 prevents the SVP from petitioning the court to appoint a medical expert for the hearing.

Civil discovery rules applicable to SVP proceedings provide an SVP access to all of his or her medical and psychological records. (*Bagration v. Superior Court* (2003) 110 Cal.App.4th 1677, 1687.) In addition, an SVP's access to the courts is not restricted by institutional rules or deficiencies as was the case in *Ex parte Hull, supra,* 312 U.S. 549 [85 L.Ed 1034] and *Bounds v. Smith, supra,* 430 U.S. 817 [52 L.Ed.2d 72]. The SVPA actually facilitates access to the courts, and a committed person always has the right to seek release by way of a petition for writ of habeas corpus.

(*People v. Talhelm* (2000) 85 Cal.App.4th 400, 404-405.) There is no constitutional violation.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P. J.

We concur:

NICHOLSON, J.

CANTIL-SAKAUYE, J.